

FLORENCE T. NAKAKUNI 2286  
United States Attorney  
District of Hawaii

THOMAS A. HELPER 5676  
Assistant United States Attorney  
District of Hawaii

JAMES A. LOFTON  
Counsel to the Chief  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Enforcement Section  
601 D. Street, N.W.  
Washington, D.C. 20004  
Telephone: (202) 514-2445  
Facsimile: (202) 514-0097  
Email: [jim.lofton@usdoj.gov](mailto:jim.lofton@usdoj.gov)

Attorneys for Plaintiff  
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, <i>et</i>	)	
<i>al.</i> ,	)	
	)	
Plaintiffs,	)	CIVIL NO. 14-00408
	)	KSC-NONE
vs.	)	
	)	
HAWAII DEPARTMENT OF	)	
TRANSPORTATION,	)	
	)	
Defendant.	)	
_____	)	

**STIPULATION TO NON-MATERIAL MODIFICATION OF CONSENT**  
**DECREE**

WHEREAS, Plaintiffs, the United States of America, on behalf of the United States Environmental Protection Agency, and the Hawaii Department of Health hereby provide notice to the Court of a non-modification to certain deadlines in the Consent Decree previously entered in the above-captioned matter.

WHEREAS, the Consent Decree resolved Clean Water Act violations from two Small Municipal Separate Storm Sewer Systems (MS4s) owned and operated by the Hawaii Department of Transportation Harbors Division (HDOT). Both MS4s are located in Oahu, Hawaii: Honolulu Harbor and Kalaeloa Barber's Point Harbor. The Consent Decree was entered on November 5, 2014 and resolved the Plaintiffs' claims at both harbors in Civil Action No.: 14-00408-KSC-NONE.

WHEREAS, paragraph 56 of the Consent Decree provides, in part, that "[t]he deadlines set forth in Section VI (Injunctive Relief) of this Decree may be modified, and those and other non-material modifications of this Decree shall be made by written agreement of the parties with notification to the Court." The modifications described below have been agreed to by all Parties and this Notification to the Court serves as written agreement to the modifications.

NOW, THEREFORE, the undersigned Parties agree to the following non-material modification to the Consent Decree, effective on the date of the last party's signature:

1. The deadline set forth in Paragraph 10.b of the Consent Decree, setting the time frame where HDOT shall hire a new manager, or engage a temporary compliance management consultant, to ensure that HDOT complies with all regulations and permits relating to MS4 compliance, was extended to September 2, 2015. HDOT is in the process of hiring a permanent manager and has hired a compliance management consultant to fill the position until a permanent manager can be hired.
2. The Revised Appendix A: Audit Provision that is attached to this Notice replaces and supersedes in its entirety the former version of Appendix A that was previously attached to the Consent Decree on November 5, 2014. The revisions to Appendix A extend certain deadlines and are necessary to ensure that the new manager or consultant required by Paragraph 10.b (see above) is in place prior to the beginning of the audits described by Appendix A.

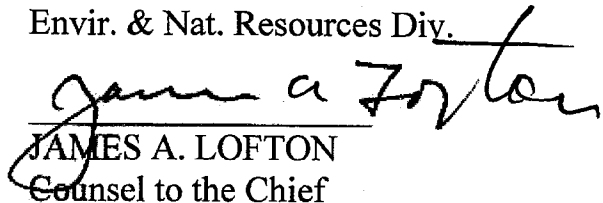
DATED:

FLORENCE T. NAKAKUNI  
United States Attorney  
District of Hawaii

THOMAS A. HELPER  
Assistant U.S. Attorney  
District of Hawaii

JOHN C. CRUDEN  
Assistant Attorney General

Envir. & Nat. Resources Div.

A handwritten signature in black ink, appearing to read "James A. Lofton", is written over the printed name.

JAMES A. LOFTON

Counsel to the Chief

U.S. Department of Justice

Envir. & Nat. Resources Div.

Envir. Enforcement Section

Of Counsel:

Ellen Blake

Assistant Regional Counsel

U.S. Environmental Protection Agency, Region 9

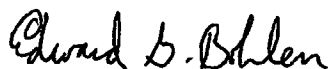
75 Hawthorne Street

San Francisco, California 94105

FOR THE HAWAII DEPARTMENT OF HEALTH

DOUGLAS CHIN  
Attorney General  
State of Hawaii


Date: 10/23/15

  
EDWARD G. BOHLEN  
Deputy Attorney General  
Health and Human Services Division  
Department of the Attorney General

FOR THE HAWAII DEPARTMENT OF TRANSPORTATION

DOUGLAS CHIN  
Attorney General  
State of Hawaii

Date: 10/23/15

  
\_\_\_\_\_  
MARJORIE A. LAU  
Deputy Attorney General  
Land/Transportation Division  
Department of the Attorney General

## **APPENDIX A**

### **ENVIRONMENTAL COMPLIANCE AUDITS**

#### **A. General Provisions**

1. This Appendix provides details of the semi-annual NPDES MS4 compliance audits required by Paragraph 10.d of the Consent Decree. The semi-annual audits shall include evaluation of common stormwater program elements at each of HDOT's three divisions (Airports, Highways and Harbors), as stated in Paragraph A.3 below, throughout the state on a per element schedule. The audits shall be completed to fulfill the following goals:
  - a. Determine and achieve compliance with the federal regulations and state MS4 permits and regulations and this Consent Decree (see Paragraph A.2, below);
  - b. Ensure information gathered during the audits is used to promote information and technology transfer between divisions; and
  - c. Identify deficiencies and potential violations that are discovered by the third party auditor and allow for timely self-correction of the deficiencies and potential violations by HDOT.
2. The audits shall be designed to assess current regulatory and administrative compliance with the following items throughout each of HDOT's divisions:
  - a. The Hawaii NPDES General Permit Authorizing Discharges of Storm Water and Certain Non-Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (Hawaii Small MS4 General Permit), Hawaii Administrative Rules, chapter 11-55, Appendix K;
  - b. NPDES permit, Permit NO. HI S000001, MS4 Permit for the HDOT-Highways, Oahu District;
  - c. NPDES Permit, Permit No. HIS000005, MS4 Permit for the HDOT-Airports, Honolulu International Airport;
  - d. Applicable Storm Water Management Plans (SWMPs);
  - e. This Consent Decree; and
  - f. Future NPDES MS4 permits and SWMPs issued to HDOT. This obligation shall not delay or prevent termination of the Consent Decree.
3. The audits shall include, but not be limited to, an evaluation of the following MS4 Program Elements as they relate to compliance at each of HDOT's three divisions:
  - a. Public Education/Outreach and Participation/Involvement
  - b. Illicit Discharge Detection and Elimination (including commercial/tenant oversight programs)
  - c. Construction Site Runoff Control
  - d. Post-Construction Runoff Control/ Permanent BMPs
  - e. Pollution Prevention/ Good Housekeeping
  - f. An analysis of how Staffing, Funding, Organizational Structure, Availability of Resources and Storm Water Program Sustainability impact MS4 compliance
4. HDOT shall audit Program Elements for the Harbors, Airports and Highways Divisions in accordance with the schedule defined in the Work Plan described in Paragraph B.1, below.

5. The audits shall be conducted by a qualified third party environmental consulting firm retained by HDOT and selected by a committee consisting of representatives of the HDOH and HDOT. The selection committee shall choose an audit firm which is experienced with environmental auditing and the permits and regulations described in Paragraph A.2, above.
6. The requirements of this Appendix related to the consulting firm's qualifications, authority to conduct the audits, and production of the HDOT Audit Reports (Audit Reports) shall be incorporated in any contract relating to the audits entered into by HDOT and the selected consulting firm to the extent allowed by State Procurement Code.
7. Any violations by HDOT discovered through the execution of the Environmental Compliance Audit detailed in this Appendix are neither "voluntarily discovered" within the terms of EPA's revised *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Policy* (Audit Policy) nor voluntarily disclosed to EPA under EPA penalty policies. Accordingly, any such violations are ineligible for penalty mitigation or other favorable treatment under the Audit Policy.
8. HDOT agrees not to attempt to use any state audit and/or privilege laws to restrict EPA's or HDOH's ability to review the Audit Reports at HDOT facilities to determine if the audits have been properly completed and HDOT has corrected any uncorrected non-compliance, potential violation, or deficiency as per its certification (see Paragraph F below). Also, HDOT agrees not to attempt to use any state audit and/or privilege laws to restrict EPA's or HDOH's ability to obtain, review and/or use the Audit Reports in any action to enforce the audit provisions of the Consent Decree. Neither information contained in the Audit Reports, nor underlying information upon which the Audit Reports relied, that indicates regulatory violations at any HDOT facility, shall be claimed as confidential business information by HDOT or its consulting firm.

**B. Work Plan/ Procurement of Services**

1. On May 21, 2015, HDOT submitted a draft audit work plan (Audit Work Plan) to EPA and HDOH for their review and approval. In developing the Audit Work Plan, HDOT shall consult EPA's guidance on auditing small MS4s: [http://www.epa.gov/npdes/pubs/ms4guide\\_withappendixa.pdf](http://www.epa.gov/npdes/pubs/ms4guide_withappendixa.pdf) The Audit Work Plan shall include the following audit schedule and describe each task necessary to accomplish the Audit Scope with targeted time frames for the consulting firm to complete:
  - a. 3 months after contract notice to proceed: Evaluation of Post Construction/Permanent BMP programs for all three HDOT divisions;
  - b. 9 months after contract notice to proceed: Evaluation of Construction Site Runoff Control programs for all three HDOT divisions;
  - c. 15 months after contract notice to proceed: Evaluation of Public Outreach/Public Involvement for all three HDOT divisions;
  - d. 21 months after contract notice to proceed: Evaluation of Illicit Discharge Detection and Elimination, Industrial Commercial Activities/Tenant Programs for all three HDOT Divisions;
  - e. 27 months after contract notice to proceed: Evaluation of Pollution Prevention/Good Housekeeping for all three HDOT Divisions;
  - f. 33 months after contract notice to proceed: Evaluation of Staffing, Funding, Organizational Structure, Availability of Resources and Storm Water Program Sustainability for all three HDOT divisions.



2. The Audit Work Plan shall include all details necessary to develop an HDOT Request for Proposal. This includes but is not limited to: required qualifications of the audit firm, minimum documents to be reviewed (e.g. SWMPs, training records, inspection reports, etc.), minimum number of field verifications, as necessary, for each program element evaluated, deliverables (notices of potential violations, draft and final audit reports), and reporting deadlines.
3. EPA, after consultation with HDOH, may reject the Audit Work Plan in whole or in part. If EPA rejects the Audit Work Plan or any portion of it, EPA shall identify the reason(s) in writing to HDOT for such rejection and may require HDOT to redraft the Audit Work Plan in its entirety or any rejection portion. If EPA does not provide written notice to HDOT of its determination within 9 Months of HDOT's submission of the Audit Work Plan (or, as applicable, the revised Audit Work Plan), HDOT's proposed Audit Work Plan shall be deemed approved by EPA and HDOH.
4. Within 30 days of approval of the Audit Work Plan or another length of time agreed to by EPA and HDOH, HDOT shall advertise a Request for Proposal for the Audit Work Plan. Advertisement for the Request for Proposal shall not exceed 45 days.
5. Within 30 days of the end of the Request for Proposal period, the HDOT and HDOH selection committee shall conduct the professional services selection of an audit firm and provide the recommendation to the Director.
6. Within 15 days of the selection committee recommendation to the Director of Transportation, or another length of time agreed to by EPA and HDOH, HDOT shall notify the potential audit firm with a letter of selection, pending negotiation of fees.
7. Within 30 days or another length of time agreed to by EPA and HDOH, HDOT shall as approved by the Director of Transportation, award the selected audit firm and proceed to process the contract for the Audit Work Plan.
8. Within 7 days of each milestone listed below, HDOT shall notify EPA and HDOH by email that the following milestones were completed:
  - a. Request for Proposal advertisement;
  - b. Awarding of Contract;
  - c. Notice to Proceed.

**C. Audits**

1. HDOT shall take all appropriate measures to facilitate the audit firm in performing the audits in accordance with the approved Audit Work Plan.
2. HDOT shall grant the audit firm full access to, and unrestricted review of all HDOT records, documents and information that the audit firm requires to complete the audits.

**D. Reporting/Audit Reports**

1. HDOT shall require the audit firm to provide preliminary written notice of any potential violations identified in any audit to HDOT, EPA and HDOH within 2 business days following an audit of a program element in Paragraph B.1, above.
2. HDOT shall require the audit firm to complete a draft audit report to HDOT within 45 days of completing an audit of a program element.
3. HDOT shall review the draft audit report to correct any factual inaccuracies within 30 days after receiving the draft audit report.

4. HDOT shall require the audit firm to complete a final audit report within 120 days, or another length of time agreed to by EPA and DOH, of completing an audit of a program element.
5. HDOT shall submit original draft and final audit reports to EPA and HDOH with the Annual Compliance Report (ACR).
6. HDOT shall provide a detailed summary of any actions taken as a result of the audit reports and dates at which those actions were taken with the ACR.
7. The HDOT Audit Reports shall contain:
  - a. A specific statement of the procedures followed, HDOT sites and activities visited and all materials reviewed during the audits;
  - b. Retrospective analysis of activities that may be outmoded, ineffective, insufficient, or excessively burdensome, and recommendations to modify, streamline, or expand them in accordance with what has been learned;
  - c. An identification of deficiencies (items which, if not corrected, will lead to potential violations) and potential violations with the applicable SWMPs, this Consent Decree, and/or applicable permit and regulations, and recommendations for improvement;
  - d. Identification of best practices and opportunities for information/technology transfer to be applied across all divisions; and
  - e. An analysis of the practices implemented for each Division's program elements and a determination as to whether identified best practices can be universally implement across all three Divisions. If best practices cannot be universally implemented, the report shall clearly describe the identified impediments.
8. HDOT shall correct any deficiency or potential violation identified in the Audit Reports or otherwise discovered by HDOT as part of the audit process set forth herein within the time frames identified in Paragraph E below.

**E. Corrections of Potential Violations and Deficiencies**

1. HDOT shall correct any potential violations within 14 days of notification as described in D.1 of this Appendix, or another period of time agreed to by EPA and DOH. In order for EPA and DOH to agree to an extension, HDOT must provide a corrective action workplan, including a final compliance date, to EPA and HDOH.
2. HDOT shall correct any deficiencies within 21 days of receiving the draft Audit Report, or another period of time agreed to by EPA and HDOH. In order for EPA and HDOH to agree to an extension, HDOT must provide a corrective action workplan, including a final compliance date, to EPA and HDOH.
3. If HDOT corrects any violation discovered through the Audit process within the time frames described above, it shall not be subject any related stipulated penalties under Paragraph 30.
4. Notwithstanding anything in E.3 of this Appendix, the United States and HDOH reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree or to obtain penalties or injunctive relief under the Act or its implementing regulations, or under other federal or State laws, regulations, or permit conditions, if HDOH or EPA independently discovers a violation of a permit, law, or statute.

5. Similarly, United States and HDOH, reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree or to obtain penalties or injunctive relief under the Act or its implementing regulations, or under other federal or State laws, regulations, or permit conditions, if an activity or violation poses an immediate threat to human health or the environment.

**F. Certifications**

1. HDOT shall provide the following information and certifications to EPA and HDOH regarding completion of each audit and correction of any non-compliance or potential violation identified in the Audit Reports or otherwise discovered by HDOT as part of the audit process within an Environmental Compliance Audit section of the ACR. An authorized HDOT official shall certify that, to the best of the official's knowledge and information, the audits were conducted in accordance with the Work Plan described above, the Audit Reports are submitted to HDOT, EPA and HDOH in the ACR as described above, and all items of non-compliance identified in the Audit Reports have been corrected or steps have been taken to correct them. If all items have not been corrected, HDOT must include a schedule for correcting the issue.

